Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

THE KIOWA TRIBE OF OKLAHOMA,
Petitioner,

v.

ROBERT M. HOOVER, JR.,
Respondent.

Petition For Writ Of Certiorari To The
Supreme Court Of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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March 6, 1996

15 pp

QUESTIONS PRESENTED

Whether, under the Indian Commerce Clause, a federally recognized Indian tribe that has not waived its sovereign immunity, is subject to damage suit in state court because the commerce from which the suit arises took place, in part, outside tribal territory.

Whether, under the Supremacy Clause, a state court may rely upon state concepts of comity to refuse to honor an Indian tribe's federally defined and controlled sovereign immunity to damage suits.

LIST OF PARTIES

The Kiowa Tribe of Oklahoma
Petitioner/Defendant

Robert M. Hoover, Jr.
Respondent/Plaintiff

J.T. Goombi
Leonard Anquoe
Maimie Bohay
Allene Woodward
George Tahbone
Charles Hines

Petitioner's co-defendants against whom no relief has been granted

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Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

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Petitioner, The Kiowa Tribe of Oklahoma, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Oklahoma entered on December 12, 1995.

OPINION BELOW

The opinion of the Oklahoma Supreme Court is reported as *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995). The text of the opinion is reproduced in the Appendix.

JURISDICTION

The opinion of the Oklahoma Supreme Court was entered December 12, 1995. This Court's jurisdiction to consider this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

Article I, Section 8, Clause 3 of the United States Constitution:

> "The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

Article VI, Clause 2, of the United States Constitution:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ."

STATEMENT OF THE CASE

The Kiowa Tribe of Oklahoma (the "Tribe") is a federally recognized Indian tribe. Under federal law, federally recognized Indian tribes are immune to damage suit, absent Congressional authorization or a waiver by the tribe.

In 1990, the Tribe purchased from Robert M. Hoover, Jr. ("Hoover") a portion of the shares of stock of an Oklahoma business corporation. The Tribe gave a promissory note, secured by a pledge of the shares, as consideration for the purchase.

The Tribe did not waive its immunity to damage suits or otherwise consent to be sued in any Court. Rather, the Tribe expressly reserved its sovereign rights. The promissory note stated:

> Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma. (R. 7)[1]

The Security Agreement pledging the shares had a comparable reservation of sovereign rights. (R. 12)

The note and security agreement were executed at the tribal governmental complex. (R. 63-64) There is little, if any, other significant connection with tribal territory. The corporation, in which shares were purchased, was in the aircraft repair business at a location outside tribal territory. (R. 65-66)

The Tribe defaulted by failing to make scheduled note payments. Hoover sued the Tribe in the District Court of Oklahoma County, State of Oklahoma.

The Tribe raised its federally recognized immunity to suit on a motion to dismiss. (R. 21) The district court ruled in favor of the Tribe. The district court recognized that the Tribe had, under federal law, sovereign immunity from a damage suit, unless there was a Congressional waiver of that immunity or consent to suit by the Tribe itself. The absence of any waiver or consent, and the express reservation of the

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[1]References to ("R.____") are to the record on appeal in *Hoover v. The Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995).

Tribe's sovereign rights in the negotiated documents, were fatal to plaintiff's claim.[2] (R. 67-69) Hoover appealed.

On appeal, the Tribe again urged, in its Answer Brief, that, as a matter of federal law, it was immune to suit, absent Congressional waiver or consent by the Tribe. The Oklahoma Supreme Court reversed the district court. The Oklahoma Supreme Court held that there is no immunity to a suit which arises from commerce with an Indian tribe outside tribal territory.[3] The court reasoned that, in the absence of federal ouster of Oklahoma's judicial power, Oklahoma courts have inherent authority to hear damage suits against Indian tribes. The cited authority for this proposition was its own decision in *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503 (Okla. 1994) *cert. denied* ___ U.S. ___, 116 S.Ct. 476, 133 L.Ed.2d 405 (1995).

The Oklahoma Supreme Court also reasoned that because Oklahoma allows itself to be sued for breach of contract, the principles of comity enable Oklahoma to disregard an Indian tribe's federally defined and controlled sovereign immunity. The Oklahoma Supreme Court thus ignored both the requirement of either a Congressional

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[2]Critical portions of the text of the trial court's ruling are summarized in opinion of the Oklahoma Supreme Court at Appendix, p. 3.

[3]The Oklahoma Supreme Court found that the note was executed outside tribal territory, even though the record contained a written stipulation, signed by the parties, that the note was executed at the tribal governmental complex.

waiver or tribal consent and the Tribe's express reservation of its sovereign rights in the note sued upon. For authority, the Oklahoma Supreme Court relied upon New Mexico's decision in *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845 (1988) *cert. denied* 490 U.S. 1028, 109 S.Ct. 1767, 104 L.Ed.2d 202 (1989).

The case was remanded for further proceedings. A money judgment was entered against the Tribe on February 14, 1996.

REASONS FOR GRANTING THE WRIT

THE OKLAHOMA SUPREME COURT DECIDED AN ISSUE OF INDIAN TRIBAL SOVEREIGNTY IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND CONFLICTS WITH 'OVERRIDING' CONGRESSIONAL GOALS OF TRIBAL ECONOMIC DEVELOPMENT.

Commerce and relations with Indian tribes are the exclusive province of federal law. United States Constitution, Article I, sec. 8, cl. 3; Article 2, cl. 2; *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985). The definition of Indian tribal sovereignty is also a matter of federal law. *Iowa Mutual Insurance Company v. La Plante*, 480 U.S. 9, 107 S.Ct. 971, 975, 94 L.Ed.2d 10 (1987). This Court has consistently defined tribal

sovereignty to include immunity from suit, absent Congressional or tribal consent. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). Because consent alone gives jurisdiction over a tribal sovereign, without that consent, any attempted exercise of judicial power over a tribal sovereign is void. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940).

Tribal sovereign immunity is essential to promote the federal policies of tribal self-determination and economic development. It allows tribes to regulate, by contract, the extent of economic risk assumed in a transaction. Encouraging tribal self-government and economic development is an "overriding goal" of Congress. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 1092, 94 L.Ed.2d 244 (1987).

In limited cases, such as regulatory or taxation disputes, this Court recognizes a degree of judicial power to resolve sovereignty conflicts between states and tribes. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 115 (1973); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). These cases do not find jurisdiction based upon either Congressional or tribal consent to suit. Rather, these cases create jurisprudence that measures the limits of acceptable action against a tribe by deciding whether there is a federal preemption of state laws or whether the action would infringe upon tribal self-government. *Mescalero*, 93 S.Ct. at 1270. This analysis of tribal sovereignty, almost by definition, is restricted to sovereignty disputes arising from

efforts to impose state regulatory laws upon tribes. *In re Greene*, 980 F.2d 590 (9th Cir. 1992), *cert. denied* ____ U.S. ____, 114 S.Ct. 681, 120 L.Ed.2d 649 (1994). This jurisprudence has not changed the rule that tribes are immune from damage suits, absent some consent.

This Court's most recent case on tribal immunity to damage suits reiterated that, absent consent, Indian tribes are immune to damage suits. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) this Court refused "to modify the long-established principle of tribal sovereign immunity" in response to the Oklahoma Tax Commission's attempt to recover a money judgment against an Indian tribe.

In this case, the Oklahoma Supreme Court decided to do what this Court refused to do in *Citizen Band*. The Oklahoma Supreme Court held that a damage award could be entered against the Tribe regardless of whether it is a federally recognized sovereign. The Oklahoma Supreme Court reasoned that the Tribe lost its immunity by engaging in commerce outside tribal territory. This decision conflicts with this Court's position in *Citizen Band* and it ignores Congress' overriding goal of tribal economic development. It also performs a substantive "re-writing" of the contract by, in effect, writing in a waiver of immunity that was, by express terms, refused by the Tribe.

Absent review, the Oklahoma Supreme Court's conflicting decision will stand as authority for Oklahoma district courts. Oklahoma has thirty-six federally recognized Indian tribes within its borders, and thus, the Oklahoma

Supreme Court's decision will involve tribes other than Petitioner. Many of these thirty-six Indian tribes will find that virtually all of their commerce must necessarily occur, at least in part, outside tribal territory. In many instances, tribal territory is either too small or too remote to be conducive to any commerce. As a practical matter, some tribes may lose all immunity.

The Oklahoma Supreme Court cannot eliminate an essential element of federal policy and frustrate an overriding Congressional goal. Certiorari should be granted because a doubtful determination of an important question of state power over Indian affairs is reason for granting certiorari. *Williams*, 79 S.Ct. at 269.

THERE IS A CONFLICT BETWEEN A DECISION OF THE OKLAHOMA SUPREME COURT AND A DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT ON THE ISSUE OF TRIBAL IMMUNITY TO DAMAGE SUITS.

The Court of Appeals for the Tenth Circuit recognizes that, as a matter of federal law, an Indian tribe is immune to damage suits, absent a clear waiver by the tribe or Congressional abrogation. *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10th Cir. 1992). This holding is consistent with a long line of decisions by this Court. *Santa Clara Pueblo*, 98 S.Ct. at 1677; *United States Fidelity & Guaranty Co.*, 60 S.Ct. at 656.

Recently, the Court of Appeals for the Tenth Circuit held that, in the absence of tribal or Congressional waiver of immunity, tribal immunity to damage suits applied to a tribe's conduct of commerce outside of tribal territory. *Sac & Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995) *cert. denied* ___ U.S. ___, 116 S.Ct. 57, 133 L.Ed.2d 21 (1995). In so doing, the Court of Appeals for the Tenth Circuit addressed a question raised in the *Citizen Band* concurring opinion as to whether a tribe's immunity is limited by geographical boundaries. *Citizen Band*, 111 S.Ct. at 912. The Tenth Circuit answered the question in a manner consistent with long established, clearly articulated precedent from this Court.

In this case, the Oklahoma Supreme Court also answered the question of whether tribal immunity has geographical limits. Despite *Hanson* and a legion of cases from this Court, the Oklahoma Supreme Court reached the singular conclusion that tribal immunity does not apply to a damage suit arising from a tribe's conduct of commerce outside tribal territory. The absence of the federally required waiver of immunity, and the presence of an express reservation of sovereign rights, were immaterial.

The Oklahoma Supreme Court's decision and the decision of the Tenth Circuit are in direct conflict. Either court would have decided the other court's case in an exactly opposite way.

This direct conflict is particularly acute because it raises the question of whether state judicial power concerning tribal immunity is limited by federal law.

Hanson, in which a federal court enjoined a state trial court from exercising jurisdiction over a tribe, makes plain the extent of the problem of this conflict. Unless there is resolution of these two conflicting decisions, tribes wishing to protect their federally recognized rights will be forced to seek federal court injunctions against state court judges. One such case is currently pending in the Western District of Oklahoma, *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Freeman, et al.*, No. CIV-95-1967T, United States District Court for the Western District of Oklahoma. With thirty-six federally recognized Indian tribes in Oklahoma, more cases are bound to follow.

The federal government has a long history of dealing delicately with legal proceedings against states. United States Constitution, Amendment XI; Title 28 U.S.C. 2283 (Anti-Injunction Act); Title 28 U.S.C. § 1341 (Tax Injunction Act); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (creating "Younger Abstention"); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) (creating "Rooker/Feldman Doctrine"). Allowing this conflict to continue unresolved and generate a series of suits for federal injunctions against state court judges is not consistent with the policies underlying the Anti-Injunction Act, the Tax Injunction Act and various concepts of federal abstention. This Court should grant certiorari to provide a resolution of this conflict for both the Oklahoma Supreme Court and the Court of Appeals for the Tenth Circuit.

THE OKLAHOMA SUPREME COURT DECIDED A QUESTION OF TRIBAL SOVEREIGN IMMUNITY WHICH HAS NOT, BUT SHOULD BE, DECIDED BY THE SUPREME COURT.

If there are to be geographical limits on tribal immunity, then those limits should not come from the Oklahoma Supreme Court relying upon the New Mexico Supreme Court for authority. Commerce with Indian tribes and definition of the nature of tribal sovereignty are matters of federal law. United States Constitution Art. 1, sec. 8, cl. 3; *La Plante*, 107 S.Ct. at 975. If states, by ignoring or re-defining tribal immunity, are to join the federal government in the regulation of Indian affairs and commerce with Indian tribes, then that change should come from Congress or this Court.

Review of this case presents the opportunity to set a clear uniform precedent and allow tribes, persons engaging in commerce with tribes, and states to understand the nature and extent of their rights and powers.

CONCLUSION

For the reasons above, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ROBERT M. HOOVER, JR.,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. 78, 185**
	)	
KIOWA TRIBE OF OKLAHOMA, an Indian Nation, J.T. GOOMBI, LEONARD ANQUOE, MAIMIE BOHAY, ALLENE WOODWARD, GEORGE TAHBONE and CHARLES HINES,	)	
	)	
Appellees,	)	

APPEAL FROM DISTRICT COURT OF OKLAHOMA COUNTY

The Kiowa Tribe of Oklahoma, through its Tribal Council, entered into a contract with the appellant, Robert M. Hoover, Jr., a non-Indian, in which the Tribe borrowed funds from the appellant and pledged common stock in an Oklahoma corporation as collateral. The Tribe then defaulted and the appellant brought suit in state district court against the Tribe for breach of contract and against six individual Kiowa Indians for fraud in the inducement of a

contract. The district court dismissed the suit for lack of jurisdiction.

REVERSED AND REMANDED.

William J. Robinson
Shirk, Work, Robinson & Work, P.C. For Appellant
Oklahoma City

Nathan H. Young III For Appellee
Tahlequah, Oklahoma

ALMA WILSON, Chief Justice:

The issue is whether a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country. We hold that it is enforceable.

FACTS

On April 3, 1990, the Kiowa Tribe of Oklahoma, represented by the individuals named in Hoover's complaint,[1] made, executed and delivered to Robert M. Hoover, Jr., a promissory note for $142,500.00, and

[1]The individuals named in Hoover's complaint are J.T. Goombi, Leonard Anquoe, Maimie Bohay, Allene Woodward, George Tahbone and Charles Hines.

executed a security agreement on the same date pledging as security 5,000 shares of common stock of Clinton-Sherman Aviation, Inc.[2] The tribe allegedly breached the contract by failing to make any of the agreed payments. After proper notice to the tribe, Hoover sold the stock at public auction.[3] Thereafter, Hoover brought this action in Oklahoma state court. The tribe moved to dismiss due to lack of jurisdiction, claiming that Hoover had not exhausted his tribal remedies and that the tribe could not be subjected to state court jurisdiction due to tribal sovereign immunity. The trial court agreed and ruled:

> (1) the only means by which an Indian Tribe can be sued is if a) Congress of the United States has authorized the suit by specific legislation, or b) the Indian Tribe has clearly waived its sovereign immunity; (2) although the subject contract does not relate to Indian lands or trust lands, the funds to pay the amount contracted for comes from the Kiowa Tribe and the payment affects the tribe's economic interest; (3) to construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity, namely, the

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[2]Clinton-Sherman Aviation, Inc. is an Oklahoma corporation engaged in aircraft repair and maintenance at the Clinton-Sherman Air Force Base, located outside Indian County.

[3]Hoover himself was the highest bidder and purchased the stock for the sum of $1.00.

> protection of the interests and property of the tribes and the individual Indians; (4) due to the express clauses in the note and security agreement stating that sovereign immunity was not waived, the state court does not have jurisdiction.

Hoover appealed.

TRIBAL SOVEREIGN IMMUNITY

The Kiowa Tribe claims that the state of Oklahoma cannot obtain jurisdiction over the tribe because it is vested with sovereign immunity, and therefore the appellant is precluded from suing the tribe. But Hoover answers that the tribe makes no distinction between activities taking place on the reservation, and those taking place off the reservation. He quotes from *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149, 93 S.Ct. 1267, 36 L.Ed.2d 114 (9173) that: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."

It is settled that absent express federal law to the contrary, state courts have jurisdiction over the merits of a tribal immunity defense to claims arising under state laws. *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989). It is also settled that state laws may be applied to Indians, even on reservations, "unless such application would interfere with reservation

self-government or impair a right granted or reserved by federal law. . . . State authority over Indians is yet more expansive over activities, such as in this case, not on any reservation." *Organized Village of Kake v Egan*, 369 U.S. 60, 75, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962).

In *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503, 508 (Okla. 1994), we recognized this test as the preliminary inquiry that must be made whenever Indian interests are included in a controversy. In *Lewis*, two tribal members entered into a contract by which title to their home and land would pass to them on September 1, 1990. When they received a warranty deed conveying the surface rights only, they sued for specific performance and an accounting for all oil and gas revenues the Housing Authority had received since the date of the conveyance. The Authority objected to the jurisdiction of the district court. One of the issues was whether Congress had affirmatively ousted state courts of their concurrent jurisdiction to entertain contract actions involving land transactions between Indian buyers and state-created Indian housing authorities. This Court held that Congress had not, and that Oklahoma has inherent concurrent jurisdiction. *Lewis*, 896 P.2d at 505. But this Court did not deal with the issue of sovereign immunity of the tribe because the issue was not argued on appeal, and had been specifically abandoned. *Lewis*, 896. P.2d at 511.

The Supreme Court of New Mexico, in *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845 (1988), *cert. denied* 490 U.S. 1029 (1989), had before it the same issue of whether a state court had jurisdiction over a breach of

contract action between a non-Indian and an Indian tribe, the Pueblo of Acoma. The plaintiff was a roofing consultant who had supervised the installation of roofs for the Pueblo of Acoma d/b/a Sky City Contractors, on two building projects located off the Acoma reservation. The Pueblo moved to dismiss the suit for lack of subject matter jurisdiction on the grounds of sovereign immunity, which the district court granted. The Supreme Court of New Mexico reversed. The court stated that the issues as "whether the state courts have the power and authority to exercise jurisdiction over an Indian tribe that has not waived its sovereign immunity for liability claimed to arise out of the tribe's off-reservation conduct." *Padilla*, 754 P.2d at 847. The court based its analysis in terms of whether the supreme law of the land had divested state courts of subject matter jurisdiction over a private claim against an Indian tribe that asserts sovereign immunity for its off-reservation business conduct.

The New Mexico court held that the exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct was solely a matter of comity. That court reasoned that since it was the policy of New Mexico to allow breach of written contract actions against the state, the district court may exercise jurisdiction over an Indian tribe engaged in activity off of the reservation for breach of contract. The New Mexico court cited *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979) for the proposition that even though a sovereign may not be sued in its own courts without its consent, that doctrine does not necessarily support a claim of immunity in another sovereign's courts. The Supreme Court of the United States held that there was no

constitutional provision that prohibits a state's exercise of jurisdiction over sovereign sister states. *Nevada*, 440 U.S. at 426. "Therefore, the policy of a state to refrain from the exercise of jurisdiction over a sister state is solely a matter of comity." *Padilla*, 754 P.2d at 850.

Oklahoma, like New Mexico, permits suits for breach of contracts against the state. *See, Cook v. Oklahoma Bd. of Public Affairs*, 736 P.ed 140 (Okla. 1987) (general contractor sued Oklahoma Board of Public Affairs for breach of contract when contractor was removed from the job). Although this state does not have a reservation system like the state of New Mexico, the reasoning used by that court is persuasive.

As we explained in *Lewis* and we now reiterate, "[W]henever Indian interests are tendered in a controversy, a state court must make a preliminary inquiry into the nature of the rights sought to be settled. Only that litigation which is explicitly withdrawn by Congress or that which infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance." *Lewis*, 896 P.ed at 508, footnote omitted. Accordingly, we hold that a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian County.

The resolution of that issue moots the issue of whether sovereign immunity covers tribal officials acting within their capacity as officers of the tribe. Whether or not the tribal officials, individually, should be held liable for the breach of contract is not before this Court.

REVERSED AND REMANDED.

WILSON, C.J., LAVENDER, HARGRAVE, OPALA and WATT, J.J., concur.

KAUGER, V.C.J., SIMMS, and SUMMERS, J.J., dissent.

HODGES, J., not participating.